SAN FRANCISCO
APR 3 1962

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EARL BRUBAKER,

Appellant,

vs.

FRED R. DICKSON, Warden of the California State Prison at San Quentin, California,

Appellee.

No. 17,583

Jessica Pl. 3192

APPELLEE'S BRIEF

STANLEY MOSK, Attorney General
of the State of California
JOHN S. McINERNY, Deputy
Attorney General
600 State Building
San Francisco 2, California
Telephone: UNderhill 1-8700

Attorneys for Appellee.

TOPICAL INDEX

Table of Cases

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EARL BRUBAKER, Appellant, vs. FRED R. DICKSON, Warden of the California State Prison at San Quentin, California, Appellee.	No. 17,583

APPELLEE'S BRIEF

STATEMENT OF CASE

Due to the unusual manner in which this case has come to this Court and due also to the lengthy earlier proceedings in both the state and federal courts, which have been had in this matter, the appellee deems it advisable to set out in full a historical statement of the various proceedings which have transpired earlier in this case so that the Court may have the advantage of having before it the full extent of the present matter.

The petitioner, Charles Earl Brubaker, is presently incarcerated in the California State Prison at San Quentin, California, under two sentences of death imposed against him by the Superior Court of the County of Los Angeles on

December 30, 1958. Appellant's two death penalty convictions were affirmed on automatic appeal by the Supreme Court of the State of California (People v. Brubaker, 53 Cal.2d 37, 346 P. 2d 8) and certiorari in that case was denied by the United States Supreme Court.

Subsequent petitions for writs of habeas corpus were denied by the Superior Court of Marin County on July 29, 1960, and by the Supreme Court of the State of California on August 1, 1960, and certiorari from these cases was denied again by the United States Supreme Court on February 20, 1961 (Brubaker v. Dickson, No. 506 Misc., OT 1960).

After the denial of these various petitions, Brubaker's execution date was set for May 16, 1961, and on May 8, 1961, a petition for habeas corpus was filed in the United States District Court for the Northern District of California, Southern Division (U.S.D.C. #39908). Due to the proximity of the execution date, a hearing on the petition was held before the Honorable George B. Harris, U.S. District Judge, on May 11, 1961, although no order to show cause had been issued by the court nor had a return to the writ been filed by the State of California. At the time of said hearing, lengthy arguments were presented to the Court, and at the conclusion thereof the Court denied the petition, denied the requested stay of execution and granted to the petitioner a certificate of probable cause.

The following day, May 12, 1961, the petitioner's request for a stay of execution was argued before this Honorable Court (USCA #17365). For reasons with which this Court is familiar, at the conclusion of the argument on May 12, the petitioner filed a motion withdrawing his notice of appeal from U.S.D.C. #39908, and this Court then proceeded as if the petitioner had filed an original application with the court for a writ of habeas corpus. This Court declined to entertain such application and transferred it to the United States District Court for the Northern District of California, Southern Division, "for the hearing and determination of said application". (See order dated May 12, 1961, in U.S.C.A. #17365.)

An order to show cause was issued by the District Court on May 12, 1961, and the case which had borne the number 17365 in this Court became number 39920 in the District Court.

On May 16, 1961, the State of California filed a return to the order to show cause issued by the District Court, and on May 31, 1961, petitioner filed his traverse to the return. The case was originally calendared for hearing in the United States District Court on May 15, 1961, but at that time it was continued for hearing until June 1, 1961. On the last mentioned date, a hearing was held and at the conclusion thereof the matter was continued for further hearing until June 29, 1961.

On June 29th, after the conclusion of the hearing, the United States District Court, the Honorable George B. Harris, Judge Presiding, dismissed the petition for the writ and denied petitioner a certificate of probable cause. A formal order reflecting the District Court's decision was signed by the Court on June 30th, and was filed by the clerk on July 3, 1961.

On or about August 2, 1961, the petitioner Brubaker filed a number of documents with this Court. Said documents purport to be notices of appeal, requests for preparation of the record, and requests for certificates of probable cause in both USDC Nos. 39908 and 39920. On or about August 10, 1961, the appellant withdrew his appeal in USDC 39908.

On Friday, August 11, 1961, the appellant's petition for certificate of probable cause to this Court was heard by the Court (In re the application of Brubaker, No. 1261, Misc.), and later that same day the appellant's application for certificate of probable cause and for stay of execution was denied.

Subsequently, on or about August 21st, appellant made a similar application to the Honorable William O. Douglas, Associate Justice, United States Supreme Court, and on September 7, 1961, Mr. Justice Douglas granted to the appellant a certificate of probable cause and an order staying his execution.

It is pursuant to these latter orders that the present

appeal comes before this Court.

STATEMENT OF FACTS

The appellant raises no issue in this case as to his guilt of the two murders which he committed, and the facts of his crimes will not, therefore, be detailed in this brief. (For a complete statement thereof, see People v. Brubaker, 53 Cal.2d 37, 346 P.2d 8.) Suffice to say that the murders took place during the evening of Sunday, July 20, 1958, and the bodies of Mrs. Morey and her son, Craig, were discovered the following Tuesday, July 22, 1958 (RT 45, 49-51). ("R.T." refers to the Reporter's Transcript of the state court trial which was lodged with the United States District Court.)

The appellant Brubaker was arrested by the Los Angeles police for these two murders about 7:30 p.m. on July 22, 1958 (RT 93-94). When questioned about the crimes at the time of his arrest, he admitted seeing Mrs. Morey on Sunday evening, but he insisted both she and her son were alive when he last saw them (RT 96, 110). In spite of his protestations of innocence, however, appellant was arrested. Brubaker spent the night at the Wilshire District Police Station, and then the next morning, July 23rd, he was taken by the police to the Police Administration Building in downtown Los Angeles (RT 96, 111-112). Several hours later, he confessed to the two murders and a signed statement was taken from him (RT 99-107).

The next day, July 24th, the appellant repeated his

confession, and this time the confession was recorded on a tape recorder (RT 133-134, 135-163). During the trial of the appellant in 1958, this tape recording was played to the jury (RT 134).

In the course of both of these confessions, the appellant made reference to his fair treatment by the police after his arrest (RT 106, 163), and he also explained that he was confessing in order to get everything straight (RT 136, 153).

At the time of trial, the appellant offered no objection to the introduction of either of these two confessions (RT 102, 134), nor did he even attempt to suggest that they were anything but completely free and voluntary. As a matter of fact, in his argument to the jury during the guilt or innocence phase of appellant's trial, his attorney, in discussing appellant's failure to testify in his own behalf (a procedure, it should be noted, to which the appellant specifically assented in open court at the time of trial (RT 167)), stated that Brubaker had chosen not to testify, because the jury, in hearing the policeman's account of Brubaker's statement to him, had already heard all that Brubaker had to say about the crime (RT 198).

The foregoing constitutes the facts of this case insofar as they appear as a matter of record in the case.

Beginning, however, at page 7 of his brief, the

appellant commences a long recitation of what he alleges to be the real facts surrounding his apprehension by the Los Angeles Police Department, his detention by that agency, his questioning by the officers, and the circumstances under which his confessions were taken and his trial was conducted. It is extremely important to note that this alleged "statement of facts" consists almost entirely of information presented in affidavit form by the appellant, and these alleged facts did not form any part of the evidence or proceedings presented to the trial court or jury. All of this information was presented to the district court judge in affidavit form and was not contained in the transcripts of the state court trial which were considered by him under the ruling of Brown v. Allen, 344 U.S. 443, 503, 73 S.Ct. 397.

Basically, the appellant's so-called facts, if believed, allege that when he was arrested he requested the services of an attorney, but that he was denied this request on four separate occasions, and that he subsequently decided he had to confess due to his fear of physical abuse by the officers and also due to his fear that until he confessed he would not be allowed to consult with an attorney. He does not allege, however, he was beaten or physically threatened by the officers.

He explains that none of this information was presented to the trial court and jury due to the failure of his

attorney to present such testimony even though he (Brubaker) had told his attorney of these alleged facts (AOB 13).

APPELLANT'S CONTENTIONS

1. The appellant contends that the two confessions admitted into evidence against him during his murder trial were obtained from him in violation of his right to constitutional due process under the Fourteenth Amendment.

2. The appellant further contends that he was denied his constitutional right to the effective aid of counsel during his murder trial in the state court.

3. The appellant further contends the United States District Court committed prejudicial error in denying his petition for a writ of habeas corpus and is basing that denial on a review of the state court trial transcript.

4. The appellant further contends that the proceedings in the District Court were so infected with procedural error and confusion as to prevent a fair consideration of his petition for the writ of habeas corpus.

SUMMARY OF APPELLEE'S ARGUMENT

I. Having failed to object to the admissibility of his confessions at the time of trial, the appellant is now precluded from raising this point on a habeas corpus proceeding in this Court.

II. The District Court properly found that the representation afforded to appellant in his state court trial was adequate and competent.

III. The Appellant's petition was fully and fairly considered by the District Court and no procedural error occurred therein.

ARGUMENT

I

HAVING FAILED TO OBJECT TO THE ADMISSIBILITY OF HIS CONFESSIONS AT THE TIME OF TRIAL, THE APPELLANT IS NOW PRECLUDED FROM RAISING THIS POINT ON A HABEAS CORPUS PROCEEDING IN THIS COURT

The appellant's first argument on this appeal involves his contention that during his incarceration by the Los Angeles Police Department and prior to the making of his confessions, the police officers denied him the right to consult with an attorney and also failed to advise him of his further right to remain silent during the interrogation. These denials, he alleges, constituted a denial of his rights to due process of the law under the Fourteenth Amendment to the United States Constitution, and rendered his confessions inadmissible.

The appellee's answer to these allegations is simply that the appellant knew of the alleged facts surrounding the taking of his confessions at the time of trial, and yet he not only did not present them to the trial court at that time, he did not even object to the admission of the two confessions into evidence. Since he was represented by counsel before and during the said trial, he has, therefore, waived any question as to their admissibility, and he cannot present the matter at this time to a federal court in a habeas corpus proceedings

since he is bound by his counsel's actions (Eury v. Huff, 141 F.2d 554, 555 (4th Cir. 1944)). It has always been the contention of the State of California throughout these proceedings that since the appellant failed to object to the admissibility of these confessions at the time of trial, he had waived the point (Burall v. Johnson, 134 F.2d 614 (9th Cir. 1943)); and the only possible manner in which this point could even be collaterally raised was by attacking the competency of the representation of counsel given to appellant at the time of trial.

In other words, although the appellant has apparently chosen to largely rest this appeal on the question of whether or not his constitutional rights were violated at the time of his arrest and interrogation by the police, the appellee submits that this is an issue which cannot be presented by him at this time due to his having waived the matter by failing to raise it in the trial court. Appellee submits that the only appealable issue before this Court is the question of the competency of appellant's trial counsel, and that this issue lacks substantive merit.

Interestingly enough, counsel for appellant apparently originally concurred in this view, because in his opening remarks made to Judge Harris in the district court at the first hearing in this case on May 11, 1961, his attack was largely directed toward the competency of appellant's trial counsel

(RT I, pp. 2-5, 10, and Judge Harris felt likewise (RT I, p. 38)), and the case was eventually decided on that basis (RT III, pp. 20, 31-32, 38-39).[1/]

Appellant now, however, chooses to rest his appeal primarily on the grounds that he was entitled to reopen the question of the voluntariness of Brubaker's confessions in the hearings before the United States District Court. It is respectfully submitted that this position was and is erroneous, and that the appellant's case rests on an untenable major premise.

It is the appellee's contention that the sole question to be considered in this case, therefore, is the competency of Brubaker's trial counsel and the representation afforded to Brubaker during his superior court trial by that counsel. And this question can and should be answered by a consideration of the trial court record by the United States District Court. (Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397.) This, of course, is precisely what was done in this case. By reading the trial court record, the District Court could determine if the representation afforded to Brubaker by his trial counsel amounted

---

1/ There were three hearings held before the U.S. District Court in this case - May 11th, June 1st, and June 29, 1961. The transcripts of these hearings are part of the record before this Court, and for ease of reference will be referred to as RT I, RT II, and RT III respectively.

to a farce or sham or token appearance within the meaning of the well-defined rule as set out in Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158; People v. Chesser, 29 Cal.2d 815, 178 P.2d 761; People v. Wien, 50 Cal.2d 383, 326 P.2d 457. And the comments of the District Court made during the hearing held before him clearly indicate he felt that Brubaker had received adequate and competent representation and that he decided the case on that basis (RT III, pp. 31-32, 38-39).

The appellant has placed great reliance in this appeal on the recent decision by this Court in the case of Griffith v. Rhay, 282 F.2d 711, but it is respectfully submitted that that decision would be inapplicable to this appeal even if the issue of the voluntariness of the confessions were properly before the Court.

In view of the fact of the recent date of that decision and the further fact it was decided by this Court, appellee will not repeat all of the facts of that case in this brief; we will, however, point out why that case is not authoritative here. In the first place, Griffith had, at the time of his trial, raised the question of the voluntariness of his confession, although he had not done so on the same grounds as he urged to this Court (cf. Griffith v. Rhay, 177 F. Supp. 386). The importance of this fact can be seen when it is realized that in deciding the Griffith case, this Court had before it the admitted facts of how Griffith's

statement had been taken and the circumstances thereof.

Contrast that situation with the one which is presented here. Brubaker, although fully aware of the alleged refusal by the police to allow him to consult with counsel, not only failed to raise the matter in the trial court, but even consented to the admission into evidence of the two confessions. It is difficult to conceive of a more classic example of waiver on his part.

Brubaker attempts to avoid the effects of this situation by claiming that he told his counsel of this matter, but the attorney took no action thereon. Besides proving rather conclusively that this is a competency of counsel case as has been continually contended by the appellee all along, this argument also tends to belie the appellant's excuse that he failed to take any action in the matter because he failed to understand its importance. If he thought it was important enough to tell his attorney, it is certainly indicative that he appreciated its import, and his failure to mention the matter to the trial court becomes more impressive as showing a binding waiver. Moreover, the decision of his trial counsel not to contest the admissibility of the confessions is certainly binding on Brubaker (Eury v. Huff, 141 F.2d 554 (4th Cir. 1944)).

Nor can it be overlooked that in the Griffith case the statement of the defendant was taken under extreme circumstances. Griffith was badly wounded, under heavy sedation,

of youthful age, and was questioned at length by the prosecuting attorney.

In the present case, Brubaker willingly gave his confession to the police, and even commented on how well he had been treated. He was certainly no novice in contacts with the police, and the tenor of his confessions certainly lends no evidence to his claim of coercion or fear.

It may or may not be true that the Fourteenth Amendment requires not only that a criminal defendant be given counsel during the pre-trial investigation of a crime but that he also be advised of that right and of his right to be silent. Appellee does not believe this to be the rule either in California or as a matter of due process. (Crooker v. California, 357 U.S. 433, 78 S. Ct. 1287; People v. Crooker, 47 Cal.2d 348, 353, 303 P.2d 753; People v. Kendricks, 56 A.C. 59, 74, 363 P.2d 13.)

In any event, however, even in the Griffith case, the Court based its decision on the grounds of prejudice to Griffith. It is one thing, in determining prejudice, to find the same in a situation where a man has allegedly waived his right to counsel before he even had a chance to consult with that counsel. However, a completely different situation with regard to possible prejudice is presented where a man who is represented by counsel, as was Brubaker, is aware of certain facts and informs his counsel thereof and then counsel determines not to act on the facts. If such a situation requires review

by a federal court, then a new and startling broadening of the habeas corpus jurisdiction of the federal courts has certainly taken place, because defendants in criminal cases will be able to fail to raise points in their state court trials and then subsequently come before federal courts and raise the matter for the first time.

It is also important to note that Brubaker's failure to raise these matters at the appropriate time is in no way attributable to the State of California or its officials. He knew of these alleged facts and so did his trial counsel, and so state action is in no way involved in his failure to properly raise the point.

II

THE DISTRICT COURT PROPERLY FOUND THAT THE REPRESENTATION AFFORDED TO APPELLANT IN HIS STATE COURT TRIAL WAS ADEQUATE AND COMPETENT

As has been stated previously in this brief, it is appellee's contention that the sole question before this Court is whether the representation afforded to Brubaker by his trial counsel was adequate and sufficient within the meaning of the Fourteenth Amendment to the United States Constitution. Some of our argument in this regard was necessarily included in the previous portions of this brief, but perhaps a few brief comments are pertinent here in view of the fact that in his brief before this Court appellant also raises the question of his counsel's competency.

The competency of Brubaker's counsel was the subject of much discussion in the various hearings held before the District Court. The appellant's present counsel have both here and before the District Court severely criticized almost every decision made by Brubaker's trial counsel and every action taken by him; however, when all of these criticisms are summed up, basically all that they amount to is a statement that <u>they</u> would have tried the case differently (RT III, 16-18). Perhaps they would have and perhaps so would have other attorneys; but it is

respectfully submitted that hindsight is much easier than foresight, and it is very ease now to say that certain of the trial counsel's decisions were unwise.

But the making of unwise decisions or the fact that other counsel would have acted differently is not the basis which gives federal courts the right to overturn a state court conviction on the question of the quality of the representation afforded to a defendant. It is not that another attorney could have done a better job which constitutes a violation of the Fourteenth Amendment; it is rather a question of whether the representation given to a defendant was pro forma or reduced the trial to a farce or sham (Powell v. Alabama, 287 U.S. 45), 77 L.Ed. 158). And by no stretch of the imagination could it be said in this case that Brubaker only received a token defense or that his trial was a farce or sham. On the contrary, Brubaker's defense was conducted by a man of long criminal trial experience, and in a fashion which had a definite trial scheme to it. The District Court noted these facts (RT III, 26-28) and decided Brubaker had received "adequate representation by counsel" (see order of USDC dated June 30, 1961).

The ridiculous basis of appellant's criticism of defense counsel can be illustrated in one way by considering the following: Appellant castigates his trial counsel

because "he was unaware of the constitutional defense based upon the 'Griffith rule'" (AOB 58). The Griffith case was decided by this Court on September 12, 1960, and yet the appellant's trial was held in December of 1958. It would, therefore, be a little difficult for trial counsel to be aware of the "Griffith rule".

In connection with his argument that his trial counsel was incompetent, appellant further urges that his defense "was undertaken by the State of California itself in the person of a Deputy Public Defender" (AOB 60), and he somehow draws the startling conclusion that the acts of the public defender were chargeable to the State of California.

This argument is completely lacking in merit. It has clearly been established that public defenders are not representatives of the State or the county, but that they are, instead, in the same position as privately employed counsel (In re Hough, 27 Cal.2d 522, 528, 150 P.2d 448; In re Atchley, 48 Cal.2d 408, 418, 310 P.2d 15). Moreover, the superior quality of the Public Defender's Office of Los Angeles County and of its staff has been commented on by both state (People v. Adamson, 34 Cal.2d 320, 333, 210 P.2d 13; People v. Hughes, 57 A.C. 91, 101) and federal courts (Collins v. Heinze, 125 F.Supp. 186, 188).

III

THE APPELLANT'S PETITION WAS FULLY AND FAIRLY CONSIDERED BY THE DISTRICT COURT AND NO PROCEDURAL ERROR OCCURRED THEREIN

As his final point in this appeal, the appellant has chosen to argue that the transcripts of the record before the District Court disclose "numerous procedural errors and resultant confusion." This appears to appellee to be a rather gratuitously insulting argument to make regarding a court which gave the appellant every courtesy and consideration.

Appellant has extracted from the record several remarks made by the trial court during the lengthy arguments of this case, and then he argues that these remarks are at odds with the District Court's ultimate disposition of the matter (RT I, pp. 28, 54; RT II, pp. 23, 43, 52; RT III, pp. 39, 40). The remarks extracted are, in reality, lifted out of context, and when read in light of the whole record show nothing more than an attempt by the District Court to fully explain the matter before it.

For example, the first comment referred to by appellant (RT I, p. 28) was followed by a request that counsel for the State explain why he thought defense counsel had not objected to the introduction of the two confessions. This explaination was given (RT I, pp. 28-30), and the court later commented that he could not say that trial counsel employed improper trial strategy (RT

I, p. 33).

As a matter of fact, the record before this Court rather conclusively illustrates that throughout the proceedings in the District Court, the judge correctly understood full well that the only issue before him was the question of the competency of Brubaker's trial counsel (RT I, pp. 37-38, 53; RT III, pp. 13-14, 20, 38-39).

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the judgment of the District Court in this case should be affirmed.

Dated: April 2, 1962.

STANLEY MOSK, Attorney General
of the State of California

JOHN S. McINERNY, Deputy
Attorney General

Attorneys for Appellee.